HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5334 OF 2005.

1. Holya Lasha Mahale
2. Gangubai Holya Mahale ..Petitioner.

Versus.

Raghunath Holya Mahale ..Respondent.

Shri. R. M. Hardas instructed by Shri. P. N. Joshi for the Petitioners.

Shri. Arun H. Palekar for the respondent.

CORAM: S.B.MHASE, J.

DATE : MARCH 29, 2006.

Oral Judgment:

1. Heard. Rule returnable forthwith with the consent of both parties.

2. The petitioner is the original defendant from Regular Civil Suit No. 8 of 1997 decided by the Civil Judge, Junior Division, Satana, District Nashik on October 23, 2002. It was an ex-parte decree passed against the present petitioner. Being aggrieved by the said ex-parte decree, the petitioners preferred an appeal. However, the said appeal was delayed by 529 days. Therefore, Civil Miscellaneous Application bearing No. 29 of 2004 was

taken out by the petitioner for condonation of delay. The said application is dismissed by the IIIrd Ad-hoc Additional District Judge, Malegaon by judgment and order dated July 16, 2005, since according to the First Appellate Court there are no sufficient grounds to condone the delay.

3. Both counsel have admitted that the impugned judgment was passed by the First Appellate Court on the basis of averments of the respective parties as reflected in the delay condonation application and reply to the said delay condonation application. Learned counsel for the petitioner states that no opportunity to lead oral evidence was given to the petitioner. He further submitted that the Court has also not passed the order under Order-XIX rule-1 of the Code of Civil Procedure, 1908 to prove a particular fact involved in the delay condonation application by filing an affidavit. Thus, the grievance made by the learned counsel for the petitioners is that unless and untill the First Appellate Court had passed an order under Order-XIX rule-1 of the CPC allowing the party to lead the evidence by way of affidavit, the Court could not have proceeded with the disposal of the matter on merits insofar as the condonation of delay is

concerned.

4. Learned counsel appearing on behalf of the the respondent also fairly conceded that there was no oral evidence recorded by the Court and equally there was no order passed by the First Appellate Court directing the parties to lead the evidence by way of affidavit. He further submitted that such course was not insisted upon by the petitioner.

5 . The delay condonation application is a miscellaneous judicial proceeding and it is to be decided on the basis of the evidence led by the parties before the Court. The regular procedure is to record the evidence of the parties by way of examination-in-chief and cross-examination. However, such procedure can be dispensed with by the Court if the Court desires to exercise powers under Order-XIX rule-1 of the Code of Civil Procedure, 1908. In that eventuality the Court has to pass an order to that effect. Order-XIX, rule-1 of the CPC is to the following effect:

> "1. Power to order any point to be proved by affidavit.- Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any

witness may be read at the hearing, on such conditions as the Court thinks reasonable.

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

6 . Thus, the Court can read the evidence led by way of the affidavit after having recorded the sufficient reasons for accepting such affidavits and, if no such order is passed by the Court, the Court is under obligation to follow the regular procedure of recording the evidence by way of examination-in-chief and cross-examination. In the present matter, it is further noticed that none of the parties have filed pursis informing the Court that the evidence is closed by either side. Thus, it is transpired that the matter is disposed of simply on the basis of the pleadings of the parties without recording of evidence in the court and/or obtaining evidence as per Order-XIX rule-1 of the Code of Civil Procedure, 1908. In the absence of pursis of the parties that they do not intend to lead evidence and/or they have closed evidence, it was inappropriate on the part of the First Appellate Court to dispose of the matter on the basis of the pleadings of the parties

simplicitor. Therefore, on this aspect of the matter, the order passed by the First Appellate Court suffers from a procedural drawback and requires to be set aside. It is accordingly set aside. However, since the matter was disposed of without following the procedure as discussed above, it has become necessary to remand the matter to the First Appellate Court to decide the delay condonation application after recording evidence of the parties in the Court and/or by way of affidavit after passing an order under Order-XIX rule-1 of the Code of Civil Procedure, 1908. In the result, I pass the following order.

: O R D E R :

(1) Writ Petition is allowed.

(2) Judgment and Order dated July 16, 2005, passed by the IIIrd Ad-hoc Additional District Judge, Malegoan in Civil Miscellaneous Application No. 22 of 2004 is hereby quashed and set aside.

(3) Civil Miscellaneous Application No. 22 of 2004 is remitted to the First

Appellate Court for final disposal in accordance with the law after recording of the evidence as discussed in the body of this judgment.

(4) Rule is made absolute accordingly.

(5) During the pendency of this petition, there was an order of status-quo. Said order shall continue for a period of three months from today. The First appellate Court shall dispose of the said matter within the aforesaid period of three months. Both parties to co-operate with the Court below for early disposal of the matter.

(S.B.MHASE, J.)